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In the Supreme Court of the United States

OCTOBER TERM, 1938

UNITED STATES OF AMERICA, PETITIONER

v.

THE GLENN L. MARTIN COMPANY, A BODY CORPORATE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above cause on January 9, 1939, reversing the judgment of the District Court of the United States for the District of Maryland.

OPINIONS BELOW

The opinion of the District Court (R. 14–19) is reported in 23 F. Supp. 262. The opinion of the Circuit Court of Appeals (R. 43–48) is reported in 100 F. (2d) 793.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1939 (R. 48). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether taxes imposed upon respondent by Titles VIII and IX of the Social Security Act are taxes "applicable directly upon production, manufacture or sale" within the meaning of a contract by which the amount of such taxes imposed subsequent to the date of the contract are to be added to the stipulated price.

2. If the answer to Question 1 is in the affirmative, whether taxes levied and collected by the State of Maryland under its Unemployment Compensation Act for which a credit is allowed against the tax imposed by Title IX of the Federal Social Security Act are taxes "imposed by the Congress" within the meaning of such a contract.

STATUTES INVOLVED

The statutes involved will be found in Appendix A, *infra*, pp. 10–13.

STATEMENT

Respondent, a Maryland corporation engaged in manufacturing aircraft and aircraft material, brought this action in the District Court for the District of Maryland to recover $7,737.32 alleged to be due on a

contract with the War Department. The facts as found by the District Court (R. 14–19) are undisputed. They may be summarized as follows:

On June 28, 1934, respondent and the War Department entered into a contract under which that Company was to manufacture certain aircraft and aircraft materials for the Government at stipulated prices (R. 2, 14). The pertinent provision of the contract (Art. 17 (3)) reads as follows (R. 14):

> It is expressly understood and agreed to by and between the parties hereto that the prices herein stipulated include any Federal Tax heretofore imposed by the Congress which is applicable to the material called for under the terms of this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress subsequent to the date of this contract and made applicable directly upon production, manufacture or sale of the supplies called for herein, and are paid by the contractor on the articles or supplies herein contracted for, then the price herein stipulated will be increased or decreased accordingly and any amount due the contractor as the result of such change will be charged to the Government and entered on vouchers as separate items.

On August 14, 1935, Congress enacted the Social Security Act (c. 531, 49 Stat. 620). Thereafter, in 1936, respondent paid $766,962.82 and in 1937 paid $2,256.58 in wages to individuals in its employ who were engaged in the performance of this contract

(R. 15). The total wages paid for both years is $769,219.40.

Based on the wages so paid, the Martin Company for 1936 paid $766.96 to the Federal Government under Title IX of the Federal Social Security Act, and $6,902.67 to Maryland under that state's Unemployment Compensation Act.[1] These payments totaled $7,669.63. Under the same laws, the Company for 1937 paid $27.07 to the Federal Government ($4.51 under Title IX, and $22.56 under Title VIII), and $40.62 to Maryland, total payments of $67.69 (R. 7, 15). The total paid to both governments for these years is $7,737.32. Of this total, the amount paid to the Federal Government is $794.03 and the amount paid to Maryland is $6,943.29.

Demand for reimbursement based on Article 17 (3) of the contract, *supra*, for the total $7,737.32 paid to both Federal and State governments was refused (Addendum to Record, 5–13), and this suit was begun in the District Court to recover the full amount. That Court decided that the Federal Social Security taxes were not "applicable *directly* upon production, manufacture, or sale" (23 F. Supp. 262, 264), and gave judgment for the United States. It was therefore not necessary for it to decide the question whether the amounts paid to the State of Maryland were taxes "imposed by the Congress." The Circuit Court of Appeals decided both questions against the United States and reversed the judgment

[1] Laws of Maryland, Extraordinary Session, December 19, 1936, c. 1.

of the District Court (R. 48). Since there is no dispute respecting the facts, the decision of the Circuit Court of Appeals represents a judgment for respondent for the full amount paid to both Federal and State governments.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that taxes imposed by the Federal Social Security Act are "applicable directly upon production, manufacture or sale" within the meaning of the contract.

2. In failing and refusing to hold that the taxes imposed by the Federal Social Security Act are not "applicable directly upon production, manufacture or sale" within the meaning of the contract.

3. In holding that the taxes levied and collected by the State of Maryland under its Unemployment Compensation Act are taxes "imposed by the Congress" within the meaning of the contract.

4. In failing and refusing to hold that taxes imposed and collected by the State of Maryland under its Unemployment Compensation Act are not taxes "imposed by the Congress" within the meaning of the contract.

5. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The court below holds that taxes imposed on respondent by Titles VIII and IX of the Social Security Act "with respect to having individuals in [its] employ" (Secs. 804, 901, *infra*, pp. 10, 11) are within

the meaning of Article 17 (3) of the contract by which the United States agrees to increase the prices stipulated therein by the amount of any subsequent taxes "imposed by the Congress" which are "applicable directly upon production, manufacture or sale" (R. 14). The court below also holds that taxes imposed, levied and collected by the State of Maryland under its Unemployment Compensation Act, for which a credit is allowed against the taxes imposed by Title IX of the Social Security Act are taxes "imposed by the Congress" within the meaning of Article 17 (3) of the contract. The decision on these questions, we submit, is erroneous, and is of large importance in view of the number of other contracts which contain the same or similar provisions.

A. The court below, in deciding that the taxes here involved are "applicable directly" upon manufacture or production, cited the language of this Court in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 581 that "The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts." From that statement it drew the conclusion that those taxes are applicable upon manufacture or production, since employment is a necessary part of both (R. 45).

That result, as the District Court had pointed out (R. 17), fails to give any weight whatever to the word "directly." Taxes which might affect production or manufacture cannot be said to be "applicable directly" thereto, simply because of that effect. The

decision distorts the plain language of the Social Security Act, which expressly imposes the tax as an excise "with respect to having individuals in * * * employ." Liability for the tax is based upon the existence of the relationship of employment, without regard to whether the services rendered by the employee are in connection with production or manufacture. Both *Steward Machine Co.* v. *Davis, supra,* and *Helvering* v. *Davis,* 301 U. S. 619, make it clear that the tax is upon the relation existing between the employer and the employee. Nor is a tax "applicable directly" upon production or manufacture when it is laid upon other activities incident thereto, even if production or manufacture may absorb it or be affected by it. *Liggett & Myers Co.* v. *United States,* 299 U. S. 383.

B. In any event, there seems to be no warrant whatever for the further conclusion of the court below that taxes imposed, levied and collected by the State of Maryland are taxes "imposed by the Congress" simply because they may be deducted from the taxes imposed under Title IX of the Social Security Act. The tax "imposed by the Congress" is only the amount which is payable under that Act after all credits, deductions or other adjustments allowed by that Act in computing the ultimate amount to be paid have been given effect. Credit or other adjustment for taxes levied by States and foreign governments has long been allowed in determining the amount of Federal income and estate

taxes to be paid, but no one has ever supposed, and no court has suggested, so far as we find, that such State or foreign taxes were taxes imposed by the United States because the United States allowed a credit for such taxes in computing the amount which it would collect.

Batavia Mills, Inc. v. *United States*, decided by the Court of Claims on June 1, 1937, unreported,[1] which was relied upon by the court below on this branch of the case, is not pertinent. That case decided that processing taxes imposed and collected by the United States under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, were recoverable by the one who paid them under a contract provision materially different from that involved here. There was no question respecting the authority which levied the tax. The only question there was whether a contractor who paid to the United States, but through a conduit, a tax admittedly imposed by the United States could recover the amount which he had paid to the United States through the conduit.

C. The decision below is of great general importance. Almost all government contracts since 1933 have contained provisions either identical with that here involved, or so similar as to present substantially the same question. It has not proved possible to make the extended search necessary to determine the precise number of contracts executed prior to the passage of the Social Security Act but under which

[1] The complete opinion appears in Appendix B, *infra*, pp. 14–19.

work was thereafter done. The War Department alone, however, states that approximately 4,000 potential claims may arise under contracts with language identical with that in Article 17 (3) of the contract in this case.

CONCLUSION

The decision below appears to be erroneous. It has decided a question of great general importance. Wherefore, we respectfully submit that this petition should be granted.

ROBERT H. JACKSON,
Solicitor General.

APRIL 1939.

APPENDIX A

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

* * * * *

EXCISE TAX ON EMPLOYERS

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

* * * * *

(U. S. C. Supp. IV, Title 42, Sec. 1004.)

COLLECTION AND PAYMENT OF TAXES

SEC. 807. (a) The taxes imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections. * * * (U. S. C. Supp. IV, Title 42, Sec. 1007.)

DEFINITIONS

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value

of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

[Exceptions not pertinent.]

(U. S. C. Supp. IV, Title 42, Sec. 1011.)

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE

IMPOSITION OF TAX

SEC. 901. On and after January 1, 1936, every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

* * * * *

(U. S. C. Supp. IV, Title 42, Sec. 1101.)

CREDIT AGAINST TAX

SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of

contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903. (U. S. C. Supp. IV, Title 42, Sec. 1102.)

CERTIFICATION OF STATE LAWS

SEC. 903. (a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which it finds provides that—

[Requirements not pertinent.]

(U. S. C. Supp. IV, Title 42, Sec. 1103.)

ADMINISTRATION, REFUNDS, AND PENALTIES

SEC. 905. (a) The tax imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections. * * *

(U. S. C. Supp. IV, Title 42, Sec. 1105.)

DEFINITIONS

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some

portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

[Exceptions not pertinent.]

(U. S. C. Supp. IV, Title 42, Sec. 1107.)

APPENDIX B

The complete opinion in the case of *Batavia Mills, Inc.* v. *The United States*, decided by the Court of Claims on June 1, 1937, reads as follows:

No. 43176

BATAVIA MILLS, INC., *v.* THE UNITED STATES

Mr. Theodore B. Benson for plaintiff. Messrs. Charles E. Foster, Jr., and Henry O. Harriman were on the brief.

Mr. Guy Patten, with whom was Mr. Assistant Attorney General James W. Morris, for defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the brief.

This case having been heard by the Court of Claims, the Court, upon the stipulation of the parties and the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

1. Plaintiff is a corporation and on April 10, 1933, entered into a contract with the United States by which plaintiff agreed to sell and deliver to the United States at the Quartermaster Depot in Philadelphia, Pennsylvania, one million yards of shirting, cotton (oxford) khaki at $0.158 per yard, and the United States agreed to pay therefor the sum of $158,000. This contract, among other things, contained the following provision:

"It is understood that the prices set forth in this contract include as a part of the pur-

chase price to be paid for the supplies all sales-tax duties, imposts, revenues, excise or other taxes applicable to the supplies covered by this contract under any Federal law in force upon the date the bid upon which this contract is based was opened. If any change in the amount of such taxes is made by Congress or if any new taxes are made applicable to such supplies by Congress after the date of opening of the bid upon which this contract is based, the prices named in this contract will be increased or decreased accordingly."

A copy of the contract is attached to plaintiff's petition herein, marked "Exhibit I," and by reference made a part hereof.

2. The material described in the contract was furnished and delivered by plaintiff to defendant, accepted and approved by the government officials, and $158,000 paid to the plaintiff as provided by the contract.

3. Included in the supplies furnished and delivered by plaintiff under the aforesaid contract were 396,640 yards of cotton shirting upon which plaintiff paid an increased cost of $7,655.15 to Grosvenor-Dale Company, a Rhode Island Corporation of Providence, Rhode Island, this increased cost being $0.0193 per yard on the cloth by reason of floor stocks and/or processing taxes in that amount paid directly to the United States by the Grosvenor-Dale Company, the "Processor" (under the Agricultural Adjustment Act, approved May 12, 1933, as amended), on the first domestic processing of the cotton (a basic agricultural commodity under said Act), from which product said shirting was manufactured.

The Grosvenor-Dale Company, in manufacturing, spinning, and processing the cotton necessary to the manufacture of the shirting provided for in the contract, was compelled to pay and did pay to the Collector of Internal

Revenue at Providence, Rhode Island, the processing tax on 396,540 yards of shirting. This processing tax, at the rate of $0.0193 per yard, was paid to the Collector by the Grosvenor-Dale Company on the following dates, on the following yardage, in the following amounts, and included with other payments in the following totals:

Date	Yardage	Tax	Total payments in which included
9/30/33	117,627¼	$2,270.21	$23,389.97
10/13/33	92,630¾	1,787.77	17,194.70
10/23/33	90,043¼	1,737.83	25,000.00
10/28/33	96,338¾	1,859.34	22,441.15

4. Under the terms of its contract with the Grosvenor-Dale Company, plaintiff was required to reimburse the Grosvenor-Dale Company, and did, as aforesaid, reimburse said "Processor" the full amount of the processing tax, which payments were made by plaintiff to the Grosvenor-Dale Company, the "Processor," as follows:

October 2, 1933	$2,270.21
October 5, 1933	1,787.77
October 13, 1933	1,737.83
October 19, 1933	1,859.34

5. On October 9, 1933, plaintiff duly made claim and demand against the United States that the contract price for shirting be increased by the sum of $7,655.15, being the processing tax applicable to the cotton from which said shirting was manufactured under the Agricultural Adjustment Act, as amended, by filing claim and demand, under oath, with E. J. Heller, Captain, Quartermaster Corps, Philadelphia Quartermaster Depot, at Philadelphia, Pennsylvania.

On November 12, 1933, plaintiff duly filed with the Comptroller General of the United States its claim and demand that the contract price be increased by the sum of $7,655.15, pursuant to the terms of the contract. This claim was denied and rejected by the Comptroller General of the United States on February 5, 1934, upon the ground that said amount was not paid by plaintiff directly to the United States.

6. Plaintiff has tendered and delivered to defendant, for delivery to the Commissioner of Internal Revenue, a waiver duly signed by Grosvenor-Dale Company, the "Processor" heretofore mentioned, of any and all claims against the United States on account of floor stocks and/or processing taxes paid by the Grosvenor-Dale Company under the Agricultural Adjustment Act, as amended, to the extent of $7,655.15. This waiver has been deposited with defendant to be held in escrow pending the final determination of this case, and to be filed with the Commissioner of Internal Revenue in the event judgment is rendered herein in favor of plaintiff.

Defendant does not object to the form of the waiver.

CONCLUSIONS OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $7,655.15.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of seven thousand six hundred fifty-five dollars and fifteen cents ($7,655.15).

OPINION

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff on April 10, 1933, entered into a contract by which it agreed to sell and deliver to the defendant a certain quantity of shirting and the United States agreed to pay for the same $158,000. The contract further provided in substance that the purchase price included all imposts applicable to the supplies to be furnished under any Federal law in force at the date when the contract was made, and that if any new taxes were subsequently made applicable to such supplies by Congress the price named in the contract would be increased accordingly.

The supplies were furnished by the plaintiff and $158,000 paid by the defendant. After the contract was made, by the passage of the Agricultural Adjustment Act, as amended, a processing tax was imposed upon the manufacturer from which the supplies were obtained amounting to $7,655.15 upon the "processing" of the goods so sold to plaintiff. The plaintiff's contract with the manufacturer corresponded with the provision in its contract with the United States and the plaintiff was required by the "processor" to pay this additional amount for the goods which it had purchased to fill the contract with the Government.

October 9, 1933, the plaintiff made a claim and demand against the defendant for this additional amount of $7,655.15. This claim was denied and rejected by the Comptroller General on the ground that said amount was not paid by plaintiff directly to the United States.

The ruling made by the Comptroller General cannot be sustained. This is not a suit

for the refund of taxes paid but an action based upon the provisions of a contract. The provisions of the law with reference to refunds of taxes collected under the Agricultural Adjustment Act have therefore no application. All of the matters necessary to establish plaintiff's claim under the contract are shown. After the contract was entered into a new and additional tax was imposed on the manufacturer from whom the contract supplies were purchased by plaintiff. The tax was passed on by the manufacturer and under the terms of plaintiff's contract with the manufacturer it was obliged to pay it. Defendant expressly agreed that the amount of the tax should be added to the purchase price. The right of plaintiff to recover the amount so paid is clear and judgment will be rendered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

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